COA NO. 44077-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TYSON MAXWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge

REPLY BRIEF OF APPELLANT

CASEY GRANNIS
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

TABLE OF AUTHORITIES (CONT'D)

Page

OTHER STATE CASES

RULES, STATUTES AND OTHER AUTHORITIES

A. ARGUMENT IN REPLY

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

No reply is needed on this issue. The opening brief contains the necessary arguments and no purpose is served by repeating them here.

2. THE COURT VIOLATED MAXWELL'S RIGHT TO A PUBLIC TRIAL WHEN IT CONDUCTED A PORTION OF THE JURY SELECTION PROCESS IN PRIVATE.

a. The Private Conference Constitutes A Closure For Public Trial Purposes.

In the opening brief, Maxwell argued the court violated his right to a public trial when it conducted a portion of the jury selection process at the clerk's station, where no one could observe the peremptory challenges being exercised. Amended Brief of Appellant (BOA) at 17-25. In response, the State claims no closure occurred, attempting to distinguish "sidebar" conferences from closures in which the public is prevented from entering the courtroom for a portion of jury selection. Brief of Respondent (BOR) at 16.

This Court has already rejected the State's proposed distinction. State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012) ("if a side-bar conference was used to dismiss jurors, the discussion would have involved dismissal of jurors for case-specific reasons and, thus, was a

portion of jury selection held wrongfully outside Slert's and the public's purview"), review granted, 176 Wn2d 1031, 299 P.3d 20 (2013).

One type of "closure" is "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave." State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011). Physical closure of the courtroom, however, is not the only situation that violates the public trial right. Another type of closure occurs where a proceeding takes place in a location inaccessible to the public, such as a judge's chambers or hallway. Lormor, 172 Wn.2d at 93 (chambers); State v. Leyerle, 158 Wn. App. 474, 477, 483, 484 n.9, 242 P.3d 921 (2010) (moving questioning of juror to hallway outside courtroom was a closure).

Thus, whether a closure — and hence a violation of the right to public trial — has occurred does not turn only on whether the courtroom has been physically closed. Members of the public are no more able to approach the bench or clerk's station and listen to an intentionally private jury selection process than they are able to enter a locked courtroom, access the judge's chambers, or participate in a private hearing in a hallway. The practical impact is the same — the public is denied the opportunity to scrutinize events.

In claiming otherwise, the State remarks, "the peremptory challenge here was done in open court where anyone could come in and

observe." BOR at 16 (emphasis added). What could the public "observe" as the peremptory challenges were exercised? The public could not hear which potential jurors were peremptorily struck, who struck them, and in what order they were struck. See 1RP 131 ("the whole idea is that you don't hear what's going on"); People v. Williams, 52 A.D.3d 94, 98, 858 N.Y.S.2d 147 (N.Y. App. Div. 2008) (sidebar conferences, by their very nature, are intended to be held in hushed tones).

When jury selection occurs at a private conference, the public is unable to observe what is taking place in any meaningful manner because the public cannot hear what is going on. There is no functional difference between conducting this aspect of the jury selection process at a private conference in the courtroom and doing the same in chambers or in a physically closed courtroom. In each instance, the proceeding takes place in a location inaccessible to the public.

b. The Right To Public Trial Attaches To The Peremptory Challenge Process Because It Is An Integral Part Of Jury Selection.

The State claims the peremptory challenge process is not subject to the public trial right because the harms associated with a closed trial have no applicability to the peremptory challenge stage of the jury selection process. BOR at 16-17. The State is wrong.

This Court recognizes the right to a public trial attaches to the portion of jury selection involving peremptory challenges. State v. Wilson, 174 Wn. App. 328, 342-43, 346, 298 P.3d 148 (2013); State v. Jones, __Wn. App.__, 303 P.3d 1084, 1090-92 (2013); see also People v. Harris, 10 Cal. App. 4th 672, 681-682, 684, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) ("The peremptory challenge process, precisely because it is an integral part of the voir dire/jury impanelment process, is a part of the 'trial' to which a criminal defendant's constitutional right to a public trial extends."), review denied, (Feb. 02, 1993).

In Wilson, this Court held the public trial right was not implicated when the bailiff excused the two jurors solely for illness-related reasons before voir dire began. Wilson, 174 Wn. App. at 347. In reaching that holding, the Court distinguished the administrative removal of jurors before the voir dire process began to later portions of the jury selection process that implicated the public trial right, including the peremptory challenge process. Id. at 342-43.

This Court recognized "both the Legislature and our Supreme Court have acknowledged that a trial court has discretion to excuse jurors outside the public courtroom for statutorily-defined reasons, *provided such juror excusals do not amount to* for-cause excusals or *peremptory challenges traditionally exercised during voir dire in the courtroom.*" Id.

at 344 (emphasis added). A trial court is allowed "to delegate hardship and other administrative juror excusals to clerks and other court agents, *provided that the excusals are not the equivalent of peremptory or for cause juror challenges*." Id. (emphasis added). Wilson's public trial argument failed because he could not show "the public trial right attaches to any component of jury selection that does not involve 'voir dire' or a similar jury selection proceeding involving the exercise of 'peremptory' challenges and 'for cause' juror excusals." Id. at 342.

In Jones, this Court held the court violated the right to public trial when, during a court recess off the record, the trial court clerk drew four juror names to determine which jurors would serve as alternates. Jones, 303 P.3d at 1087. It recognized "both the historic and current practices in Washington reveal that the procedure for selecting alternate jurors, like the selection of regular jurors, generally occurs as part of voir dire in open court." Id. at 1092. The Court likened the selection of alternate jurors to the phases of jury selection involving for cause *and peremptory challenges*. Id. at 1091 ("Washington's first enactment regarding alternate jurors not only specified a particular procedure for the alternate juror selection, but it specifically instructed that alternate jurors be called in the same manner as deliberating jurors and subject to for-cause and peremptory challenges in open court.").

Both Jones and Wilson applied the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 292 P.3d 715 (2012). Jones, 303 P.3d at 1089-92; Wilson, 174 Wn. App. at 335-47. In Jones, there was a public trial violation because alternate juror selection was akin to the jury selection process involving regular jurors, including the peremptory challenge process. In Wilson, there was no public trial violation because the administrative removal of jurors for hardship was not akin to other portions of the jury selection process, including the peremptory challenge process. Both cases support Maxwell's argument that the public trial right attaches to the peremptory challenge process because it is an integral part of the jury selection process.

The "experience" component of the Sublett test is satisfied here. Historical evidence reveals, "since the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984). The criminal rules of procedure show our courts have historically treated the peremptory challenge process as part of voir dire on par with for cause challenges. Wilson, 174 Wn. App. at 342. CrR 6.4(b) contemplates juror voir dire as involving peremptory and for cause juror challenges. Id. CrR 6.4(b) describes "voir dire" as a process where

the trial court and counsel ask prospective jurors questions to assess their ability to serve on the defendant's particular case and to enable counsel to exercise intelligent "for cause" and "peremptory" juror challenges. Id. at 343.

This stands in sharp contrast with CrR 6.3, which contemplates administrative excusal of some jurors appearing for service before voir dire begins in the public courtroom. Id. at 342-43. In further contrast, a trial court has discretion to excuse jurors outside the public courtroom under RCW 2.36.100(1), but only so long as "such juror excusals do not amount to for-cause excusals or *peremptory challenges* traditionally exercised during voir dire in the courtroom." Id. at 344 (emphasis added).

The "logic" component of the Sublett test is satisfied as well. The State's contrary claim falls flat. "Our system of voir dire and juror challenges, including causal challenges and peremptory challenges, is intended to secure impartial jurors who will perform their duties fully and fairly." State v. Saintcalle, __Wn.2d__, __P.3d__, 2013 WL 3946038 at *21 (slip op. filed Aug. 1, 2013) (Gonzalez, J., concurring). "The peremptory challenge is an important 'state-created means to the constitutional end of an impartial jury and a fair trial.'" Id. at *14 (Madsen, C.J. concurring) (quoting Georgia v. McCollum, 505 U.S. 42, 59, 112 S. Ct. 2348, 120 L. Ed. 2d 33 (1992)).

The State finds itself unable to respond to Maxwell's argument that a peremptory challenge process open to the public serves to deter the removal of potential jurors on the impermissible basis of race or gender. Batson v. Kentucky, 476 U.S. 79, 86, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986) (race); State v. Burch, 65 Wn. App. 828, 836, 830 P.2d 357 (1992) (gender). Reduced to its core, the State's argument is that the peremptory challenge component of jury selection is so inconsequential to the fairness of the trial that it is appropriate to shield it from public scrutiny. That argument fails because discrimination in the selection of jurors places the integrity of the judicial process and fairness of a criminal proceeding in doubt. Powers v. Ohio, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). The public trial right encompasses circumstances in which the public's mere presence passively contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); Leyerle, 158 Wn. App. at 479.

An open peremptory process of jury selection acts as a safeguard against discriminatory removal of jurors. Public scrutiny discourages discriminatory challenges from taking place in the first instance and

discourages the discriminatory removal of jurors that have been improperly challenged.

The Supreme Court recently issued an opinion that was fractured on how to deal with the persistence of racial discrimination in the peremptory challenge process, but all nine justices united in the recognition that the problem exists. See Saintcalle, 2013 WL 3946038 at *9 (Wiggins, J., lead opinion) (overwhelming evidence that peremptory challenges often facilitate racially discriminatory jury selection), at *13 (Madsen, C.J., concurring) ("Like my colleagues, I am concerned about racial discrimination during jury selection."); at *16 (Stephens, J., concurring) (writing separately "to sound a note of restraint amidst the enthusiasm to craft a new solution to the problem of the discriminatory use of peremptory challenges during jury selection."); at *18 (Gonzalez, J., concurring) ("This splintered court is unanimous about one thing: Racial bias in jury selection is still a problem."); at *46 (Chambers, J., dissenting) ("I am skeptical — given that we have never reversed a verdict on a Batson challenge — that [Batson] does much to police discriminatory purpose itself.").

Justice Wiggins bemoaned the fact that in 42 cases decided since Batson, Washington appellate courts never reversed a conviction based on a trial court's erroneous denial of a Batson challenge. Saintcalle, 2013 WL

3946038 at *7. If discrimination during the peremptory process is not prevented at the trial level, the error will rarely be remedied on appeal. That is what history has taught us.

In light of these justified concerns, it cannot be plausibly maintained that the peremptory challenge process, as it unfolds in real time at the trial level, gains nothing from being open to the public. The public nature of trials is a check on the judicial system, provides for accountability and transparency, and assures that whatever transpires in court will not be secret or unscrutinized. State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012). "'Essentially, the public-trial guarantee embodies a view of human nature, true as a general rule, that judges [and] lawyers . . . will perform their respective functions more responsibly in an open court than in secret proceedings.'" Wise, 176 Wn.2d at 17 (quoting Waller v. Georgia, 467 U.S. 39, 46 n.4, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984)). The peremptory challenge process squarely implicates those values.

The selection process in Maxwell's case was closed to the public because which party exercised which peremptory challenge and the order in which the peremptory challenges were made were not subject to public scrutiny. Harris, 10 Cal. App. 4th at 683 n.6. The sequence of events through which the eventual constituency of the jury "unfolded" was kept private. Id. The public does not need access to private conversations

between an attorney and his client, or between a prosecutor and his lead investigator, regarding which jurors to peremptorily strike. But the public is entitled to know "(a) Which party exercised which peremptory challenge; (b) The order in which the peremptory challenges were made; and (c) The order in which supplemental prospective jurors were 'moved forward' to take the place of the prospective jurors who had been peremptorily challenged." Id. While members of the public could discern, after the fact, which prospective jurors had been removed, the public could not tell which party had removed any particular juror, making it impossible to determine whether a particular side had improperly targeted any protected group based on race or gender. 1RP 131-35. Reversal is required because the court did not justify the closure under the Bone-Club standard. Wise, 176 Wn.2d at 12-14; State v. Bone-Club, 128 Wn.2d 254, 258-60, 906 P.2d 325 (1995).

2. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE THE DRUG COURT FEE AS PART OF THE JUDGMENT AND SENTENCE.

The State dutifully recites the statutory authority for imposing various costs and fees as part of the sentence. BOR at 20-25. Curiously, the State altogether fails to address the one fee challenged on appeal that the trial court lacked statutory authority to impose: the $100 "Thurston County Drug Court Fee." CP 60. The State cites no authority that would

allow the court to impose a drug court fee on a person who has not participated in drug court. It is not a cost "limited to expenses specially incurred by the state in prosecuting" Maxwell. RCW 10.01.160(2). The judgment and sentence cites statutory authority for all of the other fees and costs imposed, but none for the drug court fee. CP 60.

The State's assertion that the issue cannot be raised for the first time on appeal falters in the face of precedent. BOR at 18-19. The justification for allowing non-constitutional sentencing errors to be raised for the first time on appeal is that sentences are brought into conformity and compliance with existing sentencing statutes. State v. Paine, 69 Wn. App. 873, 884, 850 P.2d 1369, review denied, 122 Wn.2d 1024, 866 P.2d 39 (1993); State v. Moen, 129 Wn.2d 535, 545-47, 919 P.2d 69 (1996). Also, it avoids permitting widely varying sentences to stand for no reason other than the failure of counsel to register a proper objection in the trial court. Paine, 69 Wn. App. at 884; Moen, 129 Wn.2d at 545-47. Furthermore, challenges to the imposition of legal financial obligations raised for the first time on appeal do not present the same potential for abuse, speculation, and waste of time and resources as do belated challenges to trial errors. Moen, 129 Wn.2d at 547.

The order to pay the statutorily unauthorized drug court fee is void. See State v. Paulson, 131 Wn. App. 579, 588, 128 P.3d 133 (2006) ("If the

trial court exceeds its sentencing authority, its actions are void."). We are concerned here with an existing order that has been entered by the court without statutory authority. That order was void when it was entered, it is void now, and it will always be void.

The State's brief conflates the issue of ability to pay with the issue of whether the court has statutory authority to impose a fee at all, regardless of ability to pay. BOR at 18-19, 25. Those are separate issues. Maxwell's argument regarding the drug court fee does not turn on ability to pay. It turns on lack of statutory authority to impose the fee.

3. THE TRIAL COURT ERRED WHEN IT FOUND MAXWELL HAD THE PRESENT OR FUTURE ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.

In the opening brief, Maxwell argued the finding of ability to pay legal financial obligations is unsupported by the evidence and the court failed to determine whether Maxwell had the ability to pay in violation of RCW 10.01.160(3). BOA at 29-31. Contrary to the State's contention, this argument may be raised for the first time on appeal because illegal or erroneous sentences may be challenged for the first time on appeal. State v. Calvin, __Wn. App.__, 302 P.3d 509, 521 & n.2 (2013) (citing State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)); cf. State v. Blazina, __Wn. App.__, 301 P.3d 492, 494 (2013) (declining to allow appellant to raise argument for first time on appeal).

The State claims the trial court actually considered Maxwell's ability to pay because it "considered Maxwell's counsel's input on sentencing, including imposed financial obligations, on two separate occasions." BOR at 22 (citing 3RP 15, 20). The first occasion cited by the State simply shows the prosecutor listing the recommended costs and fees. 3RP 15. The second occasion shows the court stating that it would impose the legal financial obligations requested by the prosecutor and asking defense counsel if he required "any other clarification." 3RP 19-20. On neither occasion did the court take Maxwell's ability to pay into account because the court received no information on the matter. Ignorance of a fact is not evidence of a fact.

The State is unable to cite to one piece of evidence in the record to support the challenged finding of ability to pay. "[T]he inquiry is simply whether there is evidence to support the finding actually entered." Calvin, 302 P.3d at 521. The remedy is remand for the trial court to strike the finding and the imposition of discretionary court costs. Id. at 522.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Maxwell requests reversal of the convictions. Maxwell further requests remand with an order to strike the unauthorized drug court fee, the unsupported

finding on ability to pay legal financial obligations, and discretionary costs from the judgment and sentence.

DATED this 9th day of August 2013

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

CASEY GRANNIS
WSBA No. 37301
Office ID No. 91051
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 440747-6-II
	)	
TYSON MAXWELL,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF AUGUST 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TYSON MAXWELL
DOC NO. 821115
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF AUGUST 2013.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

August 09, 2013 - 2:07 PM

Transmittal Letter

Document Uploaded: 440776-Reply Brief.pdf

Case Name: Tyson Maxwell
Court of Appeals Case Number: 44077-6

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Reply__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Patrick P Mayavsky - Email: **mayovskyp@nwattorney.net**

A copy of this document has been emailed to the following addresses:
paoappeals@co.thurston.wa.us